Jones v Chapel-en-le Firth Parish Council **[2022] EWHC 1909**

Background and decision

The claimants, Jones ('J') all lived close to a Multi-Use Games Area ('MUGA') and a skate park, both of which were located in the Chapel-en-le Frith Memorial Skate Park in Derbyshire. The Memorial Skate Park was the responsibility of Chapel en le Frith Parish Council ('C'). J alleged that the noise emanating from the activities which were carried out on the MUGA, and also on the skate park, amounted to a statutory nuisance. The noise included ball strikes; kicks and bounces from the MUGA; impact noise of skateboards, and other equipment on the metal rampsand installations in the skate park; noise from shouting from the users of the MUGA and the skate park; and noise from music, which was played in the MUGA, and the skate park.

The District Judge held against J, on the basis that there was a sharp legal distinction to be drawn between, on the one hand, noise which was generated by the 'intended use' of the MUGA and skate park and, on the other, 'anti-social use' (such as the playing of loud music, and the continued playing of loud music, after the facilities were intended to be closed). The judge concluded that the latter did not fall to be taken into account, in his assessment as to whether the noise amounted to a nuisance. The judge also found that J had been rendered hypersensitive, by the anti-social behaviour elements of what had been going on at the MUGA, and the skate park, but for which they would not have been so adversely affected by the noise arising from the intended use of the facilities.

J appealed against the District Judge's decision to the High Court, on the grounds that the former had made an error of law. In the High Court, Turner J outlined the relevant law.

Under s79(1)(g) of the Environmental Protection Act 1990 ('EPA 1990 ') noise emitted from premises, so as to be prejudicial to health or a nuisance, ranks as a statutory nuisance.

Under s82 a person aggrieved by a statutory nuisance, can apply to a magistrates court for an abatement order. Section 82(2) provides *inter alia* that if the magistrates court is satisfied that the alleged nuisance exists, or that, although abated, the nuisance is likely to occur or recur, on the same premises, the court is required to make an order, for either or both of the following purposes, namely, requiring the defendant to abate the nuisance, and prohibiting a recurrence of the nuisance. Under s82(4) proceedings for an order under s82(2) require to be brought against the person responsible for the nuisance. In *R v Carrick DC* 1996 Env LR 273 it was held that, in the context of statutory nuisance, the word 'nuisance' bore its common law meaning.

Turner J stated that the question which fell to be answered in the appeal, was whether the antisocial behaviour, which was complained of by J, amounted to a statutory nuisance. The second main issue concerned the relevance of hypersensitivity. In *Gaunt v Fynney* (1872) 8 Ch App 8 the plaintiffs lived next to a property, in which machinery, which included a boiler, was operated. On one occasion, a sudden noise had affected a member of the claimants' household. Since that time, the plaintiffs were convinced that the boiler was dangerous. As a result, the noises which it made thereafter, became a permanent source of irritation and uneasiness to the claimants. The claimants failed in their action, on the basis that they had become hypersensitive to the noise.

Turner J then went on to consider whether a distinction should be drawn between 'anti-social noise' and 'intended use noise'. The District Judge had held that anti-social conduct, which included noise, was excluded from his consideration. However, Turner J stated that the conduct, which was covered by the EPA 1990, and the Anti-Social Behaviour Crime and Policing Act 2014 (the '2014 Act') were not mutually exclusive. Under s2(1) of the 2014 Act anti-social conduct is defined as:

(a) conduct that has caused, or is likely to cause, harassment, alarm, or distress to any person,
(b) conduct capable of causing a nuisance, or annoyance, to a person, in relation to a person's occupation of residential premises, or
(c) conduct capable of causing housing-related nuisance or annoyance to any person.

After referring to the Home Office publication, *Anti-social behaviour powers: Statutory guidance for frontline professions* (June 2022) Turner J held that there was no legal basis for drawing a distinction between noise emitted as a result of antisocial behaviour and intended use noise. He went on to state that the District Judge had sought to define the limits of C's duties and responsibilities, to the noise emitted from the intended use of the MUGA and the skate park. Turner J stated that under the common law, responsibility for a nuisance was not limited to the direct perpetrator of any activity giving rise to the undue interference. A failure to act could sometimes give rise to liability for nuisance, at common law. The leading case on this point was the House of Lords case of *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 where the defendant occupiers of land were held liable for failing to remove a nuisance (in the form of a defective culvert) of which they were aware, and which had been created by a trespasser.

Sedleigh-Denfield was followed by the Court of Appeal in *Cocking v Eacott* [2016] QB 1080. In that case, the defendant owned a house, in which she had allowed her daughter to live. The defendant lived elsewhere. The daughter's dogs barked constantly. The claimants, who lived next door, sued the defendant in nuisance. The court followed *Sedleigh-Denfield* and held the defendant liable in nuisance. Turner J observed that in *Cocking,* there was no suggestion that the defendant could have escaped liability on the basis that she had not intended that her daughter should keep a dog which barked excessively.

Turner J stated that the statutory regime, under the EPA 1990 was similar to the common law, in that s82(4)(c) provides for proceedings for an abatement order being brought (where the person responsible for the nuisance cannot be found) against the owner or occupier of the premises. The judge stated that the first stage of the statutory process was to determine whether the nuisance existed. If there was a nuisance, only the persons falling within the scope of s82(3) of the EPA 1990 were liable to be required to abate the nuisance. Once the magistrates court was satisfied that a nuisance existed, s82(2) required the court to make an order. There was no discretion to decline to make an order. However, the court could postpone making an abatement order, in order to give the parties an opportunity to assist the court in determining what steps were needed to achieve the objectives of s82(2).

Turner J stated that the District Judge had fallen into error, by excluding from his consideration, 'anti-social noise,' from the outset. Neither the common law, nor the statutory regime, drew a distinction between whether the noise in question, emanated from the intended use of the premises, or the actual use, to which the premises were put. The District Judge had fallen into error in making such a distinction. He should have considered whether the noise, as a whole, ranked as a nuisance.

As far as the issue of hypersensitivity was concerned, Turner J held that the question to be addressed was whether objectively, a normal person would find it reasonable to put up with the noise. Since the District Judge had excluded from the scope of his consideration, all anti-social noise, his attribution of hypersensitivity to antisocial behaviour, including noise, was not, without more, an answer to J's complaints.

Turner J concluded by answering, in turn, the questions which had been raised at first instance by the District Judge.

Firstly, consideration should have been given to the impact upon health (ie sleeplessness on the part of J) of all the noise emanating from the MUGA and the skate park, regardless of whether it was the result of intended use, or antisocial behaviour.

Secondly, no distinction should have been made between noise which had been caused by the intended use of the premises, and noise which was caused by antisocial behaviour.

Thirdly, since it was impermissible to distinguish between intended and antisocial noise, it was also impermissible to treat anti-social noise, in part, as a cause of hypersensitivity, such as to negate a finding of nuisance. In any event, the existence of hypersensitivity was not a defence, where even a person of normal resilience would have found the noise to be unreasonable.

Turner J reserved his decision on the choice of remedy, in order to allow the parties time to consider the implications of his findings.

Comment

Jones raises several interesting points.

Section s79(1)(g) provides that 'noise which is prejudicial to health or a nuisance….ranks as a statutory nuisance.' The subsection comprises two quite separate limbs, namely, noise which is prejudicial to health nuisance, and noise which is a nuisance.

As far as the latter limb is concerned, it is established law that, in order for a state of affairs to rank as a statutory nuisance, in terms of s79(1) of the EPA 1990, the impact of the adverse state of affairs on the pursuer, must equate to that which would rank as a nuisance, under the common law: see eg *R v Carrick DC* (above); *Robb v Dundee City Council* 2002 SLT 853; *Newham LBC v White* [2015] 3 WLUK 347. Therefore, given that no distinction fell to be made between a common law nuisance and a statutory nuisance, the sole question which the court in *Jones*, was required to determine was whether the noise was unreasonably loud or *plus quam tolerabile*: see eg *Watt v Jamieson* 1954 SC 56. There was no legal authority for the District Judge to conclude that the unintended noise (ie the noise which was made after the premises were closed) from the MUGA and skate park, should be left out of account, in determining whether the noise ranked as a statutory nuisance, under the EPA.

The second concerns the relevance of hypersensitivity, on the part of J. It is trite law that the courts are disinclined to award a remedy to the oversensitive. This general principle finds expression in the law of nuisance. The leading case here is *Heath v Brighton Corporation* (1908) 24 TLR 414. In that case, the claimant, a priest, complained that the noise and vibrations, which emanated from the defendants' premises, ranked as a nuisance. The claimant was denied a remedy, on the basis that he possessed hypersensitive hearing. However, in determining whether the pursuer is oversensitive the reason for his hypersensitivity is irrelevant. The court simply adopts an objective approach. Namely, whether a reasonable person would have found the noise to be unreasonably loud. The District Judge had been wrong to take the impact of antisocial conduct on J into account when he was addressing this issue.

Whereas the cases which Turner J cited in his judgement is applicable, in terms of the meaning of the second limb of s79(1)(g) (ie the 'nuisance' limb) it is suggested that it is irrelevant, in terms of the meaning of the first limb, namely, whether the relevant noise is prejudicial to health. Turner J seemed to have confused both limbs in his judgement, by failing to draw a distinction between noise

which ranked as prejudicial to health, and noise which ranked as a nuisance. His decision would seem amenable to appeal on these grounds, in the author's view.

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